



DISCOURSE OF FINES.

SHEWING

By what easie (although corrupt and unlawful) method of practice it may happen, that any person or his Heirs in England, at one time or other, to be legally defrauded and disinherited by abuses in Fines.

*Stabitur presumptioni, donec probatur in contrarium.
Quod alias bonum & iustum, si per vim vel fraudem petatur, malum & iniustum est. Lit. cap. Remitter.*

By T. L. of *Lincolns-Inn Esq;*

Fines at the Common Law, and confirmed by divers Statutes.

They were anciently levyed before the Justices of the Court of Common-Pleas in Court, to the intent the said Justices might be fully satisfied, and judge the Conusors of such Fines to be the parties themselves, of full age, free from Dures, Ideocy, and Lunacy: And if they doubted whether it was the party, then proof was to be made to them of it: And also if a Feme-covert be one, that she be solely and secretly examined, as to her age, consent, and consideration for her levyng such Fine; and be acquainted with the nature of it, lest that her Husband should by any threats or fraud,

A

endeavour

endeavour the obtaining her Estate by any undue and unlawful practice. And if the Court were unsatisfied as to his or her age, then they to put him or her to their Oath : And if not satisfied therewith, then such parties to make proof thereof by the Church-Book, or otherwise.

The Common Law, as to the manner of it, is confirmed by the said Statute; the words of which Statute be, that
Stat. de Finibus, such Fine to be acknowledged by the party himself
 18 E. 3. who ought to be of full age, of good memory, out of Prison, &c. And if a Feme-covert be one, the must be examined by four of the said Justices, as to her consent, &c. The reason given by the said Statute, and reason of the Common Law, why there is used such solemnity in levying of Fines, is, a Fine being a Record of a high nature, and will not be presumed to lye, and will admit no Averment against it self. It being taken for granted in every Case, where a Fine is levied, that there hath been the aforementioned care and examination; and that the Court hath been fully satisfied, that such Conusor was the same party, of full age, free from Ideocy, Lunacy and Dures. The Statute, 32 H. 8. maketh exception of Infants, Idcoats, &c. levying of Fines, and divers other Statutes; so as 'tis evident, that such persons, neither by the Common or Statute-Laws of the Realm, are intended to make any disposal of their Estates.

The said Statute reciting, Whereas there were many aged and impotent persons that lived in remote places of this Kingdom, who by no means could come before the Justices in Court to levy Fines, so as to settle their Estates; To prevent which inconvenience, the said Statute doth provide two or one of the Justices, by the assent of the residue of the Bench, to visit the party so diseased: And if one go, he shall take with him an Abbot, or Prior, or Knight of good fame and credit. And hereof the Writ of *Dedimus Potestatem* had its beginning, and intended to be granted in such cases onely where the parties were not able to come to the Court; and accordingly was framed: *Ac prefatus A, adeo impotens existit, quod absq; maximo sui corporis periculo usq; ad Westm. ad diem in brevi præd. content. ad recognitionem, quod in hac parte requiritur faciend. &c.* Which form albeit continueth to this day, yet sometimes the Conusans is taken of them which are in health, and able to travel; and sometimes when the Conusors are in health and in Town, to the apparent abuses of the power given by the *Dedimus*, and to the ruine of Families.

A *Dedimus Potestatem* is sometimes given to a Serjeant at Law or Knight, with other persons joyned with them: Any two of which may return the *Caption*: All which persons are to inspect the persons, and examine them, and be satisfied that they be the same persons, of full age, not Ideots or Lunaticks, and free from Dures. But in case there be no Knight at the *Caption*, then is one of the Justices of the Court to give an *Allocatur* or allowance for passing the same.

The Chief Justice can, *ex Officio*, take a Fine.

The common abuses used in levying of Fines are, where one person doth represent another: in Case of Infants: in Case of *Non compos mentis*: in Case of Dures or compulsion; and in Case where a Feme-covert is cheated in the uses of such Fines, or not examined.

The common way as these abuses are hatch'd and framed in deceit of the Law and Court of Common Pleas, are either by *Dedimus Potestatem*, directed to Mercenary persons, who value not their reputation; or such as connive at, or contrive the doing of it; ignorant persons in such affairs. And in some Cases where such Commissioners and Courts themselves are deceived: of all which I shall give an account, and shew what remedy hath been formerly used to recompence the parties abused by such practices: And what are the remedies at this day: As also, how just the Law is in Cases of the like nature in lesser concerns.

The Case was, that *Hubert* being convicted in Star-chamber, by Bill exhibited against him for procuring one *Webster* to counterfeit himself to be one *Gellibrand*, and to acknowledge a Fine in his name before Commissioners procured for that purpose, of *Gellibrands* land: The sentence in that case was, that he should make

Fine to the Queen, and should be imprisoned; and that the Fine should be void, if it could be done, by entering a *Vacate*; if it could not, then *Hubert*, by Fine, or otherways, as the said *Gellebrand* should devise, should reconvey the Land to him and his Heirs, in the same manner as it was before, at the time of the Fine levied. My Lord Coke in his 12 Rep. in *Hungates* Case, says, that this Fine could not be *vacated*; so that *Gellibrand* was otherways relieved.

The Earl of Exeter bought a Lordship in *Leicestershire*, of a Gentleman who had formerly made his Wife a Joynture. Tempore Jac in the Star chamber, of it, who covenanted with his Lordship that he and his Wife would levy a Fine of it; but could not get his Wife

39 Eliz. in the
Star chamber, Hu-
berts case. Crokes
Report.

thereto:

thereto : but he and another woman, whom he suborned and hired to come in his Wifes place and name to joyn with him to levy a Fine, which accordingly passed at the Bar of the Court of Common Pleas; and shortly after the Gentleman dyes, and his true Wife entred and claimed her Joynture. The business being brought into the Star-chamber, and there proved, the said Earl was glad to allow her her Joynture, or that which was equivalent; but the said Fine stood good against her. The Statute of 21 Jac. 26. doth provide, that any person acknowledging any matter of Record in another persons name, the said person not being party or privy thereunto, that it shall be Felony in such person. But it (as in the cases beforementioned) one person should acknowledge a Fine in another persons name, and this person as should so acknowledge the same, should be convicted thereof, according to the Statute; yet such Fines shall stand good, because it is a Record of a high nature, and will admit of no Averment against it self.

Where Lands were demised to one *Bushley*, in tail remainder over, *Bushley* proved an Idiot and deformed Creature : one *Tempore Jac.* *Nicols* and others doth get him into their custody, and carries him to a place unknown, and there kept him in secret, until he had acknowledged a Fine to one *Botham* before Justice *Southcot*, to the use of the said *Botham* : which business being examined by my Lord *Dyer*, and the rest of the Justices of the Court of Common Pleas, they declared this Fine to be good, and not reverfable, notwithstanding the practices and Ideocy; but declared that the Judge that took the same, was not worthy to sit to take another : which Case was, as I have heard, examined in the Star-chamber, and the parties judged to pay fine to the King, and imprisoned until recompence : But what was done to the Judge I know not; there are several presidents, where Judges, Commissioners, and other Offenders have been fined, where there hath been any apparent neglect or contrivance proved against them.

Butcher having married a Wife, who had 20 l. per annum Inheritance, and an Infant of nineteen years of age, gets a *Dedimus Potestatem* directed to two Gentlemen, who examined her, and took her to be of age; so as the *Caption* was returned, and the Fine become a Fine of Record : his Wife not long after dyed without inspection; her Heir brings his Bill of Complaint in the Star-chamber against *Butcher* and his Commissioners, and there proves that *Butcher* knew her

Butchers case,
tempore Jacobi in
Star-chamber.

her to be an Infant, and did notwithstanding practice the procuring of this Fine in deceit of the Court. The sentence was, That he should make Fine to the King, and recovery by Fine, or otherways, to his Wives Heir, or pay 400 *l.* which was the value of the Land; but the Fine could not be avoided.

One Carrel marries *Johan* Heir of *Waincomb*, an Infant about nineteen, who by *Dedimus Potestatem* acknowledged a Fine of her Lands, and dyes without inspection: The uses of which Fine being to the said Carrel for his life; and after his decease, to her Heirs. *Waincomb* Heir of *Johan*, brings his Bill in the Star-chamber; where the business being examined, and it not appearing that Carrel knew his Wife to be an Infant, nor any practice or neglect in him or the Commissioners; and the settlement to be but reasonable, being but for life, which he would have had, in case he had a Child, as Tenant by Courtesie; and the Estate being not fully taken out of her blood, the Court gave no sentence therein.

Waincomb and Carrel's case, tempore Eliz. in Star-chamber, 12 Rep.

Note, That the laudable Custom of Tenancy by the Courtesie, is allowable no where but in *England*, the next Heir in all other places entring immediately.

This Parliament hath been pleased to examine the undue procuring a Fine levied by Sir *Edward Powell* Knight and Baronet, and his Wife; the same being procured by fraud on his Wife; which Fine was by them made void, which could not have been otherways done.

The relief of Heirs and other persons prejudiced by Fines deceitfully levied in the Common Pleas, in the Star-chamber, and their sentences for such misdemeanors, was a terror which prevented many attempts, which possibly would have been practised on Fines and Recoveries, in case that had not been. The want of which Star-chamber to punish and rectifie such abuses in Fines, is at this day the daily ruine of many a Family: for how easie is it to get qualified Commissioners in this corrupt age, to return the *Caption* of Fine of an Infant of five years of age, or of a person they never saw nor examined; by which means they may do and dispose of any Estate as they please? And if such Infant shall dye, and not reverse the same, it shall bind him and his Heirs. And how easie is it to get one person to represent another to Commissioners, and they to return the *Caption*, and this person to go beyond Sea, and 'tis possible may never be discovered? being an easier way to get money then on the High-

way (the one way of getting money, being as just and reasonable as the other) And how many persons may by this means get his Wives Inheritance or Joynture from her? and when she shall examine the business, there must be admitted no averment against a Record.

How reasonable the Law is in Cases of smaller concerns, where men are not concluded by a presumption of solemnity, so easily avoided by corrupt persons.

IF any Infant bind himself in any Bond or Deed, or alien any Lands, Goods or Chattels, he may avoid the same at any time whatsoever, either by Plea or Writ, or his Heir may avoid the same. Infancy being a good Plea in bar to all Actions, except for necessities, as Diet, Clothes, &c.

If any Idiot, or *Non compos mentis*, make any Feoffment, Gift, Lease or Release, &c. it may be avoided during his life, by Office at the Kings Suit, which shall have relation from the time of his Nativity, to avoid all acts done by him; and after his death, the King shall deliver his Lands to the right Heirs. *Fitz-Herbert* in his *Natura Brevium* says, he may avoid such act done by himself, either by Plea or Writ; and that his Heir may avoid the same by Entry, Plea or Writ, is the opinion of all the Books.

If one person doth represent another, and borrows money, and gives Bond, or any other assurance in any others name, he may avoid the same, by pleading *Non est factum*, or such like Plea; and so puts the other to prove that he was the person that borrowed the same; or his Heirs, Executors or Administrators may have the same Plea.

If any person be imprisoned, or forced to enter into Bond, or promise, or any other assurance of the like nature, he hath his Plea *per Minus* or *per Dures*, which is a Bar in any such case; But if any of these abuses happen in the levying a Fine, none of these just Pleas can be admitted, for the reason before mentioned, it being a Record of a high nature, and will admit of no Averment against it self; and presumed to be done with such solemnity, as aforesaid: Whereas, persons that practice such deceits, do for the purpose get a *Dedimus Po- restatem*, directed either to such that contrive their designs, or ignorant

rant persons, or such as they are sure will take and pass the same: And this when the Conusor might well come to the Court to acknowledge the same.

What acts Feme-Coverts are capable of doing, not being of Record.

Without doubt our Ancestors, if they had thought it reasonable or convenient, that a man having married a Wife, should dispose of her Estate as he pleased, would not have tied him up so strictly as they have by the Statute of 32 H. 8. cap. 28. where they have provided, That no Husband shall make any Lease of his Wifes Inheritance, without her joyning in it: And although she do, it must be thus qualified, That the Rent be reserved to the Husband and Wife, and to the Heirs of the Wife: And also must be reserved the Rent it hath yielded within twenty years; and such Lease not to exceed 21 years, or three Lives. It doth also provide (notwithstanding all this regular caution) That the Wife be of full age: And every Lease made by the Husband and Wife that is not thus qualified, is voidable. Before the Statute, no Feme-covert could make a Lease but for her own life.

The Statute and Common Law, in all Cases, doth give great respect to persons that claim by Inheritance; insomuch, that my Lord Coke says, That if it were possible that two persons could have an equal title to any one Estate, the one claiming by Inheritance, the Law would prefer his title before the other: And nothing is more sacred to any person, then his birth-right; nor any thing a greater spur to any persons honest industry, then the thought and moral certainty of his Relations reaping the fruits of it.

The Star-chamber being put down, there is now left no remedy to any person that is injured by the undue procuring of Fines, but by the Justice of Parliament, which are uncertain as to their sitting, and so the proceeding therein tedious and chargeable, which makes many an injury to the ruine of several persons pass unexamined, esteeming the remedy as bad as the disease, if it happen in a small concern.

The want of relief, and severe punishing of offenders of this nature, makes the same seem justifiable. There is hardly any Country-Solicitor or Attorney, but is able to advise how a fine may be levied and procured, in any of the Cases beforementioned; and it being good, being done, they matter not how they get it.

'Tis certain, there hath been more abuses in Fines, since the putting down the Star-chamber, then ever was before; there being no Case in the Year-books, and other ancient Law-books, where any persons incapacited by Law ever levyed any Fines. The solemnity beforementioned being so duly observed by the Court of Common Pleas, as 'twas almost impossible to get any such thing done; which solemnity is at this day observed by the Court; so that every person that acts any such thing, does it by *Dedimus Potestatem* directed to such Commissioners as are before mentioned.

Case In *Michaelmas* Term 1667, there was examined in the Common Pleas a dangerous precedent, but remarkable Case of an Infants levying a Fine; which was, that a Gentleman within ten miles of *London*, in *Michaelmas* Term, 1664, procured marriage with an Heir, who lived about the same distance, against her Mothers and Guardians consent: Her Mother and next Heir apparent, do the same Term repair to the Court of Common Pleas, where her Mother doth make Oath, That her Daughter was an Infant of eighteen, married against her consent, and Heir to Lands of 500 *l. per annum* value. And upon this, prayed the Court to take notice thereof; and that if such persons should attempt to procure any Fine of the Infants Lands, that they would not permit it. The Court do accordingly take notice thereof; and for further security, do make a positive Rule, prohibiting any Fine to be levyed, during the minority of this Infant; and do order the same to be left with the Clerk of the King'silver, which was accordingly done: Notwithstanding all which, and her Husband knowing his Wife to be an Infant, and of the Rule of Court prohibiting the same, he doth in *Trinity* Term following procure a *Dedimus Potestatem* directed unto two Souldiers (procured for that purpose) who did the same Term in a Councillors Chamber in the Temple, the Court of Common Pleas sitting at *Westminster*, take the acknowledgement of a Fine from the Infant (she being in health) never examining her as to her age, pretending themselves ignorant in such affairs, and what they did, was by the advice of the Councillor there present, who knew her to be an Infant; and do there make a Deed, leading the uses of this Fine, settling the Estate to the Husband and his Heirs. Afterwards they came to one of the Justices of the said Court, who not remembring the Rule, doth unawares give an allowance for passing the same; and do no long after, in the Sicknes-time, come to the King'silver-Office, and do there prevail with a Clerk of that Office to pass the same. The Wife dyes in *August* 1667, without any Issue of her

her body, Her Heir next Term complains to the Court, and shews these practices; as also that the Wife (notwithstanding her incapacity of Infancy) was manifestly surprized and cheated in the uses of the said Fine, she being informed it was for one use, and it made to another. Notwithstanding all undue procuring of the said Fine in deceit and contempt of the Court, their own Order against it, and the Infancy of the woman confest on all hands; yet could not the Court *vacate* the said Fine, and declared that the same could not be *vacated*, but by Parliament: But because the Husband knew of the Rule of Court, and did practice the procuring the said Fine in contempt and deceit of the Law and Court, the Court committed him to the *Fleet*, and fined him.

Note, that almost every Estate in *England*, either hath, are, or may be enjoyed by Infants, or persons not qualified by the Law to dispose of their Estates; if so, what security hath, or may have any person that shall or may claim any Estate after them? It may be answered, that if any such person make any Deed of Gift, Lease, Release, or such like act, it not being of Record, shall not bind him nor his Heirs. And further, that he cannot dispose of the same by any Act of Record. The Court of Common Pleas taking such care to prevent unqualified persons levying of Fines, as they will not suffer any such Records to pass in their Court, being against the Statute and Common Law.

But we find by experience, that unqualified persons have disposed of their Estates by tricks devised in deceit of the Court; and that the parties, and their Heirs, are remediless, because the Court cannot help them: And this become a common practice.

The best way is, if the Heir or other Relation suspect any such trick to be put on the Court, to give notice thereof to the Court, who will take particular care to prevent it. This also may prove as ineffectual, as in the last Case, and as remediless, if once done; for 'tis the act of the Court, and presumed to be done with such solemnity, and the Court fully satisfied the party to be no Idiot, Lunatick, Infant, the same person; and if Feme-covert, to be secretly examined, and informed of the nature and quality of the settlement, to prevent their Husbands over-reaching them by any fraud or practice; although it be done by a Commission directed (as it was in a late Case examined in that Court) to Cleavers of Wood, Souldiers, or any other inferior ignorant persons whatsoever, and against the rule of the whole Court.

The Nature of an Inspection.

THe formality of which is, that the parties must voluntarily come into Court, that the Court may see them, and take proof of their Infancy (the Court taking themselves to be sole Judges in this point) which they enter on the Record, and the same is avoided by Writ of Error: and this to be done before they come to the age of one and twenty. In several Cases I meet this Maxim, *Ubi eadem ratio, ibi eadem lex*; which if I fail not, doth not follow in this particular. The intent of an Inspection is onely to satisfy the Court as to the parties Infancy, and so to make it void: If the Court can be otherwise satisfied as to the Infancy, there is *eadem ratio* that it should be void, but not *eadem Lex*, as in the Case last mentioned, where the Court was fully satisfied, both before the Fine levied, and afterwards upon the examination of the practice.

Deceits which happen by Inspections.

There is very seldom any of these Inspections, but there is some deceit intended by them, either where an Infant hath levied a Fine, and some one hath upon the reputation thereof lent moneys, and taken the Lands for security, or purchased the same to deceive such person, either of the Land or Money, they then come to be inspected, and so avoids the security or purchase, and gets both the Land and money; as it was in one *Sherlocks* Case, cited in *Styles Reports*, and divers other Cases of like nature: The Maxime such a Purchaser hath for his Money, is *Caveat Emptor*.

The reason why there are so few Inspections, is;

1. Because such Infants must be inspected before they come to age, so as they often come of age before they understand the nature of it: and when they understand it, they cannot be permitted, it being to be done in the Minority.

Case If a Feme-covert-Infant levy a Fine with her Husband, she cannot be admitted to bring a Writ of Error in her own name, but her Husband must joyn with her; who will not suffer it, unless it be for his benefit: As it was in *Trinity Term, 1669*, declared in the Court of Common Pleas, where a Husband had unduly procured his Wife an Infant under twenty, to levy a Fine of her Land. The Heir apparent injured by the same, doth the same Term complain to the Court. The Husband and Wife are ordered to come in-

to Court. The Wife informs the Court, that it was her desire what she had done, and that she did freely acknowledge the same. The Court told her that she was incapable of consenting and doing what she desired : And then made an Order, that her Husband and she should joyn in a Writ of Error to vacate the said Fine. Which Order the Husband disobeying, the Court committed him to the *Fleet*, but could not by any means vacate the said Fine, or otherwise compel the Husband to joyn : So that if the Husband dye not before she attain her age, although she should never so much desire the reverting of the same ; yet this inconsiderate and unlawful act of hers, shall be conclusive to her Heirs and Self.

3. Because such Infant doth often dye under age without inspection, and so cannot be brought to be inspected.

4. In some Cases where such Infants are deceived in declaring the uses of such Fines, such Fines and Deeds leading the uses thereof being commonly done after a Clandestine manner, without the advice, privity or knowledge of any of the Infants friends, who should advise them ; and they telling them that it is for one use, and they make it o another : of all which abuses there are Cases too plentiful.

I am incertain whether the *Dedimus Potestatem* be granted upon a bare suggestion of infirmity and inability, or upon an *Affidavit*. It is all one whether, if it be false : An Oath being onely a more solemn manner of lying ; and he that will suggest a lye to a Court, will scarce stick to swear one. The Judge who alloweth the Fine, doth give the Commissioner or Solicitor (who are to be present at the acknowledgement) their Oath ; who are to satisfy the Judge as to the manner of the acknowledging the same, and that the same was according to Law (which is) that they were not Infants, Idiots, &c. If the Judge be satisfied with such Oath, he allows the Fine. Notwithstanding which, persons incapacitated by Law do levy the same ; such Practicers procuring a Knight to take the *Caption*, and so it passeth without Oath, or an *Affidavit*-man for that purpose. Practicers of unlawful things, seldom stumble at a false Oath, if that may effectually forward their practices. From the validity of such practices, there is raised a corrupt Maxime,

Factum valet quod fieri non debet.

There is very little difference in honesty and justice, between a Fine obtained by such fraud and practices as aforesaid, and a Deed that

is forged, raised or forced. The difference which is, is this, That a man hath liberty to defend himself against the one, but is concluded by the other.

How unreasonable is it that a Fine being good, being levied upon the presumed solemnity, and care taken before it was levied; which solemnity and care is avoided; so that the solemnity and care in these cases is the equity and reason why such Fines are good; which solemnity and care being wanting, the Law is wanting of its equity and reason; and where that happens to be, it is *Summum jus*, which is accounted *Summa injuria*.

Since it is evident, that it is provided by the Laws of this Realm, that no one person shall represent another to acknowledge, any thing on Record to the prejudice of that other; nor any Madman or Idiot, persons under age, persons forced against their wills, to make any settlement or disposal of their Inheritances, to the prejudice of themselves or Heirs; and that there hath been tricks and devices found in Law, whereby such practices are done in deceit thereof (and against the particular care of the Court, they having notice, and making Orders to prevent such abuses) to the ruine of Families; and if not prevented, will be to the ruine of many more: And that there hath been formerly a remedy, by which many a wronged person by such practices had relief; and that such remedy is taken away, and the abuse become almost remediless: It may well consist with the honor and interest of a Parliament to provide a remedy, whereby such offences should be severely punished; and the persons wronged by such practices, relieved against them, as they formerly were.

*That these abuses by Fines may be remedied,
is the wishes of*

T. L.

F I N I S.